res judicata
523(a)(6)
523(a)(9)
retroactivity
ORS 487.540(1)
ORS 475.005(14)

Barney v. Lamb-Oostman (In re Barney), BAP. No. OR-92-1865-RJO (9th Cir. BAP Mar. 26, 1993) (affirming Judge Perris)

A prepetition default judgment was res judicata as to the validity and amount of a claim in a subsequent dischargeability proceeding. The court did not err in finding that the debtor, while intentionally intoxicated on paint thinner, drove his car into that of the plaintiff. Under the Oregon criminal statute in effect at the time of the accident, paint thinner could constitute a drug if used for the purpose of intoxication. The debt was therefore nondischargeable under both § 523(a)(6) and (a)(9).

P93-5(8)

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re MICHAEL LOWELL BARNEY, Debtor.	BAP No. OR-92-1865-RJO BK. No. 391-35481-P7 Adv. No. 91-3551
MICHAEL LOWELL BARNEY, Appellant, v. DAWN LAMB-OOSTMAN, Appellee.	MEMORANDUM

Argued and Submitted on
February 17, 1993 at Portland, Oregon

Filed - MAR 26 1993

Appeal from the United States Bankruptcy Court
for the District of Oregon

Honorable Elizabeth L. Perris, Bankruptcy Judge, Presiding

Before: RUSSELL, JONES, and OLLASON, Bankruptcy Judges.

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The bankruptcy court held that an obligation incurred for damages, obtained by a default judgment in state court, resulting from a collision where the debtor operated his automobile while intoxicated, was nondischargeable under § 523(a)(9)[1] and § 523(a)(6). AFFIRMED.

I. FACTS

On October 31, 1978, Creditor/Appellee Dawn Lamb-Oostman ("Lamb-Oostman") was traveling west on East Burnside Avenue in Portland, Oregon at approximately 12:43 p.m. Ms. Lamb-Oostman's car was struck head-on by a car driven on the wrong side of the road by Michael L. Barney ("Barney"), the Debtor/Appellant. Barney was arrested for driving under the influence, reckless driving, hit and run, and driving without insurance. The debtor was convicted of Assault III by a plea agreement.

On August 19, 1979, Lamb-Oostman filed a civil complaint seeking damages of approximately $121,748.00 for injuries suffered as a result of the accident. A default judgment was entered for $126,748.58. Barney has not paid any part of the civil court judgment. The judgment was renewed on or about July 30, 1990.

On August 15, 1991, Barney filed a Chapter 7 petition. Lamb-Oostman filed a complaint in bankruptcy court seeking a determination of nondischargeability of this debt under

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[1] Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101 et seq. and to the Federal Rules of Bankruptcy Procedure, Rules 1001 et seq.

§ 523(a)(6). The complaint was later amended to add a claim under § 523(a)(9). After trial, the court found the debt to be nondischargeable under both § 523(a)(6) and § 523(a)(9). Barney appeals. We affirm.

II. ISSUES

Whether the judgment against the debtor that arose from a collision caused by the operation of automobile while under the influence of paint thinner is nondischargeable.

III. STANDARD OF REVIEW

Findings of fact are reviewed under the clearly erroneous standard, while conclusions of law are reviewed de novo. In re Holm, 931 F.2d 620, 622 (9th Cir. 1991); In re Acequia, Inc., 787 F.2d 1352, 1357 (9th Cir. 1986); Federal Rule of Bankruptcy Procedure 8013.

IV. DISCUSSION

A. Issues Waived

We must first note that Barney failed to address certain issues, such as laches, designated in his statement of issues filed with this Panel. We need not address those issues here and deem them to be waived for purposes of this appeal.

B. Res Judicata of State Default Judgment

First, Barney contends that a bankruptcy court cannot recognize res judicata or give collateral estoppel effect to a default judgement. We disagree.

The amount of the judgment has been fully established in state court and shall not be relitigated here. The doctrine of

"res judicata does preclude the debtor in dischargeability proceedings from raising issues as to the validity and amount of a claim by a party based upon a prior judgment whether actually litigated or entered by default." Russell, Bankruptcy Evidence Manual, § 3 at 13-14 (West 1991-92 Ed.); In re Comer, 723 F.2d 737, 740 (9th Cir. 1984).

C. Nondischargeability

Whether this liability is nondischargeable is another matter entirely, one that is governed by § 523. We agree with the bankruptcy court that the facts of this case support a finding of nondischargeability under § 523(a)(6) and § 523(a)(9).

The bankruptcy court, after a trial on the issue of nondischargeability, orally announced the following findings of fact:

> Defendant sniffed paint thinner at the Timber Lanes. Thereafter Defendant drove his car. Defendant drove off the right side of the road and hit at least one mail box. He then swerved into the oncoming lane of traffic. Two cars swerved to the right to avoid a head-on collision with Defendant's car. Defendant had a head-on collision with plaintiff's car which was the third car. . . . When interviewed by Officer Foteff, defendant denied going off the road or into the oncoming lanes - - lane of traffic. Officer Foteff smelled paint thinner on Defendant's breath at the time he interviewed him after the accident.

(Transcript of Proceedings, July 7, 1992). As we have stated, supra, these findings of fact are reviewed under the "clearly erroneous" standard. The eyewitness testimony offered by Roger Collins, Sr. and John Berryman support the conclusions of Barney's erratic driving just prior to the collision. That

testimony, combined with Lamb-Oostman's and Officer Foteff's testimony, clearly support the court's factual conclusions. Barney admitted to Officer Foteff after the collision that he had been sniffing paint thinner to get high. No evidence was offered by Barney at trial to contradict the evidence offered of his intoxication from inhaling paint thinner. The court's factual findings cannot be said to be clearly erroneous.

The application of these facts to § 523 are conclusions of law reviewed de novo. See Standard of Review, supra. The elements of a nondischargeability action must be proven by a preponderance of the evidence. Grogan v. Garner, ___ U.S.___, 111 S.Ct. 654, 661 (1991).

Section 523(a)(6) excepts from discharge any debt resulting from "willful and malicious injury" by an individual debtor to another entity or the property belonging to another entity. In In re Cecchini, 780 F.2d 1440, 1443 (9th Cir. 1986), the Ninth Circuit has held that the requirement of "willful and malicious" in § 523(a)(6) does not require a creditor to prove that a debtor acted with intent to injure, but that there was an "intentional act which caused an injury." The court in Cecchini went on to say that "[w]hen a wrongful act . . . done intentionally, necessarily produces harm and is without just cause or excuse, it is 'willful and malicious' even absent proof of a specific intent to injure." Id. at 1443; In re Aubrey, 111 B.R. 268, 274-75 (9th Cir. BAP 1990).

Section 523(a)(9)[2], excepts from discharge any debt "for death or personal injury caused by the debtor's operation of [a] motor vehicle if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance."

The facts of this case clearly support a finding of nondischargeability under either § 523(a)(6) or § 523(a)(9) or both. Barney inhaled paint thinner to become intoxicated and operated a motor vehicle while intoxicated. This was a wrongful act done intentionally which produced harm without just cause or excuse, which satisfies the willful and malicious standard of § 523(a)(6). Section 523(a)(9) is satisfied almost by definition.

Barney argues that involuntary intoxication is a defense to nondischargeability and that the bankruptcy court erred by excluding evidence of involuntary intoxication at trial. However, nowhere in Barney's brief or in the record is there an indication of exactly what act was lacking in volition (i.e., whether the inhaling of paint thinner was involuntary or the operation of the car). No offer of proof was made at trial. Failure to make an offer of proof precludes raising the question

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[2] Section § 523(a)(9) as amended was the statute in effect at the time Barney filed his bankruptcy petition which was on August 15, 1991. Subsection (a)(9) was revised by the Criminal Victims Protection Act of 1990, Pub. L. 101-581, which became effective for all cases filed after November 15, 1990. This same revision was also a part of the Crime Control Act of 1990, Pub. L. 101-647, November 29, 1990.

on appeal. Fed.R.Evid. 103(a)(2). See Yost v. A.O. Smith Corp., 562 F.2d 592, 595 (8th Cir. 1977). Further, no mention of the substance of what evidence could be offered appears in Barney's brief. We cannot tell what evidence was erroneously excluded, or even if any evidence exists on the issue of an involuntary act. In the face of Barney's admissions to Officer Foteff, it appears highly improbable that any evidence exists of involuntary acts. We cannot remand based on a general allegation of involuntariness, where no offer of proof was made nor any indication is given of what evidence might be offered.

Barney further argues that because paint thinner is not an "intoxicating liquor" or a "controlled substance" under the Oregon statute, he therefore cannot be liable. Oregon law in effect in 1978 at the time that the accident occurred[3] was as follows:

> A person commits the offense of driving while under the influence of intoxicants if he drives a vehicle while:
> . . .
>
> (b) he is under the influence of intoxicating liquor, a dangerous drug or narcotic drug; or
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> (c) he is under the influence of intoxicating liquor, and a dangerous drug or narcotic drug.

Or.Rev.Stat. § 487.540(1)(1977). In addition to pharmaceutical

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[3] Barney argues that the Oregon statute in effect at the time the action for nondischargeability was filed is controlling in this case. This is in error. The controlling statute for the state law violation was the one in effect when the violation occurred. The bankruptcy law in effect at the time of the filing of the bankruptcy petition governs the adversary action brought under the bankruptcy code.

type drugs such as those used for medical treatment, a "drug" is also defined by the Oregon statute as:

> (c) Substances (other than food) intended to affect the structure or any function of the body of humans or animals;

Or.Rev.Stat. § 475.005(14)(1977).

Barney argues that paint thinner is "intended solely for the purpose of affecting paint and not the human body" and therefore is not a "drug" under the statute. (Trial Transcript at 60). While we may agree that paint thinner is not normally intended to affect the human body, when it is ingested or inhaled for the purposes of becoming intoxicated it would clearly qualify as an intoxicant. We agree with the bankruptcy court that paint thinner is a drug within the meaning of Or.Rev.Stat. § 487.540(1) and § 475.005(14) when used by a person for the purpose of getting high. We cannot agree that Oregon law permits the operation of a motor vehicle while under the influence of an intoxicant because "paint thinner" is not specifically listed as a "drug" under the Oregon statute. Clearly the intent of the law is to prohibit people from driving while impaired. The bankruptcy court's reading is consistent with this intent.

V. CONCLUSION

For the foregoing reasons we conclude that the bankruptcy court did not err in finding Barney's debt to be nondischargeable under § 523(a)(6) and § 523(a)(9). AFFIRMED. Lamb-Oostman's request for sanctions pursuant to Fed.R.App.P. 38 is DENIED.